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IN THE
COURT OF APPEALS OF INDIANA

FRANKLIN JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0610-CR-560
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mick Jensen, Magistrate
Cause No. 49G20-9911-PC-198590

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Franklin Johnson appeals his conviction of dealing cocaine and thirty-year sentence. Johnson raises two issues, which we expand and restate as: (1) whether the trial court erred by failing to properly explain to Johnson the consequences of waiving a jury trial; (2) whether the trial court erred by failing to adequately articulate its balancing of the mitigating and aggravating circumstances; (3) whether the trial court erred by considering an incident of prior arrest that did not result in a conviction; and (4) whether Johnson's sentence is inappropriate. We affirm, concluding that Johnson's sentence was not inappropriate, and that the trial court did not err in examining Johnson regarding his understanding of the waiver of a jury trial, balancing the mitigating and aggravating circumstances, and considering a prior arrest that did not result in conviction.

Facts and Procedural History

The facts most favorable to the judgment indicate that on November 12, 1999, the State charged Johnson with three counts of possession of cocaine and three counts of dealing in cocaine. On August 16, 2000, the parties appeared for a jury trial, but before the trial started, Johnson pled guilty to one count of dealing in cocaine as a Class A felony, for which the minimum sentence is twenty years, the maximum sentence is fifty years, and the presumptive sentence is thirty years.[1] See Ind. Code § 35-50-2-4. By pleading guilty, Johnson admitted that, "on or about November 8, 1999, [he] did knowingly deliver to a cooperating individual a controlled substance, that is: cocaine, and said delivery took place

within one thousand (1000) feet of a school." Appellant's Appendix at 31. In exchange, the State agreed to dismiss the five remaining counts.

The plea agreement indicated the trial court had discretion to sentence Johnson; however, the agreement contained a sentence "cap of 30 years at [the Department of Correction]" as the maximum possible sentence pursuant to the guilty plea. Id. at 55. During the guilty plea hearing, the trial court accepted Johnson's guilty plea and stated, "[t]he Court having examined [Johnson] under oath finds [he] understands his constitutional rights in this matter, he's made a knowing, voluntary, free and intelligent waiver of those rights." Transcript at 15.

On September 12, 2000, Johnson's sentencing hearing was held. The trial court found as the only mitigating circumstance that Johnson had minor children. Further, although the trial court did not mention any aggravating circumstances, the trial court declared that Johnson had a "long history of contacts with the criminal justice system" and proceeded to discuss specific incidents of Johnson's criminal history. Id. at 32. The trial court sentenced Johnson to thirty years in the Department of Correction. Johnson now appeals.

Discussion and Decision

Johnson argues his waiver of a jury trial was invalid because the trial court failed to properly explain the consequences of waiving this right. Johnson also argues the trial court failed to clearly articulate the balancing of the aggravating and mitigating circumstances. In addition, Johnson argues the trial court erred in considering a prior arrest that did not result in

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[1] The sentencing statute now refers to "advisory" sentences. As discussed, infra., the presumptive

a conviction. Finally, Johnson argues his thirty-year sentence is inappropriate.

I. Waiver of the Right to Jury Trial

Johnson contends his waiver of jury trial was defective because "[t]he trial court's examination of [Johnson] on this matter was cursory and did not effectively reveal [Johnson's] understanding of the probable consequences of his act in waiving jury." Brief of Appellant at 4.

A criminal defendant is guaranteed the right to a jury trial under both the United States and Indiana Constitutions. Gonzalez v. State, 757 N.E.2d 202, 204 (Ind. Ct. App. 2001), trans. denied. "It is fundamental error to deny a defendant a jury trial unless there is evidence of the defendant's knowing, voluntary and intelligent waiver of the right." Id. at 205 (quoting Reynolds v. State, 703 N.E.2d 701, 704 (Ind. Ct. App. 1999)). In order to effectively waive the right, "[t]he defendant must express his personal desire to waive a jury trial and such a personal desire must be apparent from the court's record." Poore v. State, 681 N.E.2d 204, 206 (Ind. 1997).

In this case, Johnson's plea agreement provided that Johnson understood he waived "the right to a public and speed[y] trial by jury." Appellant's App. at 55. Johnson placed his initials next to this provision and signed the agreement. Johnson's attorney also signed the plea agreement. See Poore, 681 N.E.2d at 207 ("[A] defendant's understanding may be inferred when he and his attorney both sign a written waiver of the jury trial right and file it in open court").

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scheme applies in this case.

Additionally, during the guilty plea hearing, the trial court engaged in the following conversation with Johnson:

> The Court: At the bottom of page 2 paragraph 7 is a list of Constitutional Rights, did you read that list?
> Mr. Johnson: Yes sir.
> The Court: You understand those…
> Mr. Johnson: Talking about the ones that I initialed?
> The Court: Yeah.
> Mr. Johnson: Yes sir.
> The Court: And those are you[r] initials TJ next to them? I mean FJ?
> Mr. Johnson: Yes sir.
> The Court: You understand in this case you have a right to a public and speedy trial by jury?
> Mr. Johnson: Yes sir.
> The Court: Any questions about what a jury trial is?
> Mr. Johnson: No sir.

Tr. at 11-12. The trial court also mentioned other rights that Johnson waived by entering into the plea agreement. The trial court then asked Johnson, "By pleading guilty you give and waive each and every one of those rights including the right to a public and speedy trial by jury, do you understand that?" Id. at 12. Johnson answered, "Yes sir." Id. The trial court then asked, "At this time do you wish to plead guilty and waive those rights?" and Johnson responded, "Yes sir." Id.

The trial court further questioned Johnson as follows:

> The Court: Anybody force you to plead guilty?
> Mr. Johnson: No sir.
> The Court: Doing this of your own free will?
> Mr. Johnson: Yes sir.
> The Court: You think this is in your best interest to take this agreement today?
> Mr. Johnson: Yes sir.

Id. at 15. The trial court then determined that Johnson's plea was made "knowingly,

voluntarily, freely and intelligently." Id.

The record indicates that Johnson knowingly, voluntarily, and intelligently waived his right to a jury trial. Johnson expressly stated he was not forced to accept the plea. Also, the trial court could have inferred that Johnson intelligently waived his right to a jury trial when Johnson stated he believed it was in his interest to accept the guilty plea. In addition, Johnson does not appear to argue that he did not waive his right to a jury trial voluntarily and intelligently. Instead, he suggests that, because the trial court did not sufficiently explain to him the consequences of waiving a jury trial, he did not "knowingly" waive this right.

The trial court asked Johnson whether he understood that he was waiving his right to a jury trial by pleading guilty, and Johnson responded he did in fact understand. See Barker v. State, 812 N.E.2d 158, 164 (Ind. Ct. App. 2004), trans. denied (no error where defendants responded affirmatively to the trial court's question of whether they understood the rights they were giving up). Johnson was also well acquainted with the judicial process. The trial court expressed, "[t]he court will note…that [Johnson] has a long history of contacts with the criminal justice system." Tr. at 32; see Poore, 681 N.E.2d at 207 (Defendant's "significant criminal history suggests a high level of familiarity with the judicial process, making it quite likely that he knew what a 'jury' was"). Hence, based on Johnson's criminal history, the trial court could have inferred that Johnson understood the consequences of waiving the right to a jury trial. See Gonzalez, 757 N.E.2d at 206-07 ("[I]f courts were required to inform defendants of every conceivable consequence of waiving the right to jury trial, the wheels of justice would grind to a proverbial halt"). Thus, the trial court did not err in determining

Johnson understood he was waiving his right to a jury trial by pleading guilty.

II. Aggravating and Mitigating Circumstances

Johnson next argues the trial court erred by "fail[ing] to adequately articulate its balancing of aggravating and mitigating circumstances." Br. of Appellant at 7. Johnson cites to Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006), which provides that "[i]n a sentencing statement, a judge must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence." Br. of Appellant at 9-10.

Because Johnson committed his offense before the statutory amendments of April 25, 2005, Johnson's sentence is governed by the former "presumptive" sentencing scheme rather than the recent revision. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). "When a trial court deviates from the statutorily prescribed presumptive sentence, it must identify all of the significant mitigating and aggravating circumstances, state the reason why it considers each circumstance to be either mitigating or aggravating, and articulate the evaluation and balancing of these circumstances to determine whether an enhanced or reduced sentence is appropriate." Id.

Bryant is distinguishable from this case in one important way. In that case, the defendant challenged his enhanced sentences because they exceeded the statutory presumptive sentence. See Bryant, 841 N.E.2d at 1156. In this case, however, Johnson's sentence of thirty years was the presumptive sentence for a Class A felony, the class of

offense to which he pled guilty. See Ind. Code § 35-50-2-4. By pleading guilty, Johnson avoided being subject to the statutory maximum sentence of fifty years and was instead subject to the maximum possible sentence of thirty years because his plea agreement contained a sentence cap of thirty years.

Here, the trial court did not err in articulating the balancing of aggravating and mitigating circumstances. In Custis v. State, 793 N.E.2d 1220 (Ind. Ct. App. 2003), trans. denied, we held that "when the trial court imposes the basic sentence prescribed by a particular criminal statute, compliance with the applicable sentencing statutes is presumed regardless of whether the record includes the trial court's specific enumeration of aggravating and mitigating factors." Id. at 1228. In this case, the trial court sentenced Johnson to the presumptive thirty-year sentence.

Also, the trial court considered the fact that Johnson supported his two minor children as a mitigating circumstance. However, it then determined that this mitigating circumstance was counteracted by Johnson's "very sporadic" work history. Id. at 34. Although the trial court did not explicitly identify any aggravating circumstances, it expressed at the sentencing hearing, "[t]he court will note…that the defendant has a long history of contacts with the criminal justice system." Tr. at 32.[2] The trial court then discussed specific incidents comprising Johnson's criminal history. See Taylor v. State, 786 N.E.2d 285, 286-87 (Ind. Ct. App. 2003). Therefore, we cannot say the trial court erred by failing to articulate the balancing of aggravating and mitigating circumstances.

[2] The record does not include the trial court's sentencing order.

III. Discussion of Prior Arrest

Johnson also argues "[t]he trial court improperly considered a prior dismissed case as constituting an aggravating circumstance in sentencing [him]." Br. of Appellant at 8. At the sentencing hearing, the trial court expressed:

> [Johnson] was then arrest[ed] July 31st 1996 for Murder that case end[ed] up getting dismissed because the state declined prosecution due to unavailability of essential witnesses. And that case indicates that [Johnson] became upset with the gentleman [and] shot him in the knee. As the gentleman ran out he chased him down to his car and shot him twice more in the head killing him because the gentleman threw a lawn chair at him.

Tr. at 33. The trial court apparently relied on the pre-sentence report investigation in making this statement.

The act of placing a person under arrest indicates only a belief that the arrested person is guilty of a crime, but does not, of itself, constitute a determination of historical fact of that person's guilt. See Tunstill v. State, 568 N.E.2d 539, 544 (Ind. 1991). Moreover, "[a] record of arrest, without more, does not establish the historical fact that the defendant committed a criminal offense on a previous occasion such that it may be properly considered as evidence that the defendant has a history of criminal activity." Id.

In this case, the trial court relied upon more than mere evidence of Johnson's arrest record by discussing Johnson's criminal record. The trial court mentioned Johnson pled guilty in 1996 to criminal confinement and battery. The trial court also indicated that Johnson pled guilty to confinement in 1999. Along with the prior arrest for allegedly committing murder, the trial court mentioned other occasions on which Johnson was arrested, the most significant of which were when he was a "juvenile or a young adult" because of the

number of arrests. Tr. at 32; see Miller v. State, 709 N.E.2d 48, 49 (Ind. Ct. App. 1999) ("Although an arrest record is not evidence of prior criminal history, '[t]his information is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime and is therefore properly considered by a court in determining sentence'" (quoting Tunstill, 568 N.E.2d at 545)); see also Johnson v. State, 837 N.E.2d 209, 218 (Ind. Ct. App. 2005), trans. denied.

Further, the trial court noted Johnson had at least seven jail misconduct violations while incarcerated at the Marion County Jail. See Field v. State, 843 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), trans. denied (Trial court properly considered the defendant's jail violations as a "minimal aggravating factor"). The trial court also referred to Johnson's pending charges for intimidation and battery, stating, "[Johnson] is alleged to have beaten up a witness in another case for his friend over in Mari[o]n County Jail." Id. at 34. The trial court discussed these pending charges after considering specific incidents of Johnson's criminal history, and thus, it apparently regarded these charges, not as part of his criminal record, but rather as an indication of his character. See Cox v. State, 780 N.E.2d 1150, 1157 (Ind. Ct. App. 2002). Therefore, the trial court did not err in discussing a prior arrest that did not result in conviction at the sentencing hearing.

IV. Appropriateness of the Sentence

Finally, Johnson argues his sentence is inappropriate under Indiana Appellate Rule 7(B). Article VII, Sections 4 and 6 of the Indiana Constitution authorize "independent appellate review and revision of a sentence imposed by the trial court." Childress v. State,

848 N.E.2d 1073, 1080 (Ind. 2006) (quoting Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002)). This appellate authority is implemented by means of Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The presumptive sentence (or now the advisory sentence) is the starting point the legislature has selected as an appropriate sentence for the crime committed. See Wiess v. State, 848 N.E.2d 1070, 1072 (Ind. 2006).

Although Johnson cites to Appellate Rule 7(B), he does not specifically argue his sentence is inappropriate in light of his character and the nature of the offense. Still, Johnson's thirty year sentence for dealing in cocaine was not inappropriate. Regarding his character, Johnson has an extensive criminal history and, at the time of sentencing, charges for intimidation and battery were pending against Johnson, suggesting he has a pattern of not conforming to the conditions imposed by our criminal justice system. See Ware v. State, 859 N.E.2d 708, 726 (Ind. Ct. App. 2007), trans. denied. As for the nature of the offense, the record shows that Johnson committed dealing in cocaine. Importantly, the offense was committed within 1,000 feet of a school. See Schnitz v. State, 650 N.E.2d 717, 724 (Ind. Ct. App. 1995), aff'd, 666 N.E.2d 919 (Ind. 1996) (By increasing dealing in cocaine from a Class B felony to a Class A felony for committing the offense within 1,000 feet of a school, our legislature has determined that dealing in cocaine is a serious offense, and that "schoolchildren need extra protection from the adverse affects of drug trafficking.").

Nothing about Johnson's offense makes it less egregious than the typical offense of dealing cocaine near a school. Thus, we cannot say that Johnson's thirty-year sentence was inappropriate.

Conclusion

The trial court did not err in determining Johnson understood the consequences of waiving the right to a jury trial, articulating the balancing of mitigating and aggravating factors, and discussing a prior incident of arrest that did not result in a conviction. Johnson's thirty-year sentence was also not inappropriate.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.